

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU 0086 of 2013
[High Court Criminal Case No. HAC 116 /12S)

BETWEEN : TUIMATEO TUKAINIU

Appellant

AND : THE STATE

Respondent

Coram : Gamalath, JA
Prematilaka, JA
Temo, JA

Counsel : Mr. Lee. T for the Appellant
Ms. Prasad. J for the Respondent

Date of Hearing : 18 August 2017

Date of Judgment : 14 September 2017

JUDGMENT

Gamalath, JA

[1] I have had the advantage of perusing the draft judgment prepared by Prematilaka JA.

There are two grounds of appeal raised to impugn the judgment of the learned Trial Judge and they have been referred to in the draft judgment of Prematilaka JA.

In relation to Ground 1, I am of opinion that the learned Trial Judge's directions to the assessors on the ingredients of the Charge of rape as per Section 207(1)(2)(a) of the Crimes Decree No. 44 of 2009 is accurate and precise. In light of the directions I hold that there is no merit to this ground of appeal.

In relation to Ground 2, as borne out by the proceedings of the trial, the Court had been consistent in informing the appellant his right to legal representation. In the sense, there had been four instances his right was explained to him and the appellant did not seem to have availed himself of the opportunity to obtain the services of a counsel to assist him in the trial. Further, there is a final intimation to court that the appellant wished to appear in person to defend himself. In the circumstances, this 2nd ground of appeal cannot succeed.

In the circumstances I am in accord with the conclusion of the draft judgment of Prematilaka JA.

Prematilaka, JA

- [2] This appeal arises from the conviction of the Appellant on a single count under section 207 (1) and [2] (a) of the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 16 March 2012. The Information dated 11 April 2012 describes the particulars of the count as the Appellant having had carnal knowledge of P (name withheld) without her consent.
- [3] After trial, the three assessors expressed a unanimous opinion that the Appellant was guilty of the said count. The Learned High Court Judge on 03 April 2013 concurred with their opinion in the Judgment and convicted the Appellant. On 06 April 2013 the Learned Judge imposed a sentence of 09 years of imprisonment with a minimum serving period of 07 years before the Appellant becomes eligible for parole.

Preliminary observations

- [4] The Appellant in person had sought to appeal against the said conviction by way of a letter dated 25 April 2013 which had reached the Court of Appeal Registry belatedly on 31 July 2013. In the said letter the Appellant appears to have challenged both the conviction and sentence. The State had tendered written submissions on 24 July 2014 on both aspects of the appeal. However, the Legal Aid Commission had, on behalf of the Appellant by way of a notice of motion tendered on 05 September 2014 accompanied by an affidavit from the Appellant, sought an extension of time, permission to file an amended application for leave to appeal and leave to appeal only against the conviction in terms of section 35(1) (a) and (b) of the Court of Appeal Act. An amended petition of appeal containing 03 grounds of appeal against the conviction and written submissions seeking leave to appeal against the conviction had been tendered on the same day by the Legal Aid Commission. Further submissions had been filed by the Legal Aid Commission on 02 October 2014 in support of the application for extension of time. The State had resisted the Appellant's application for extension of time in its written submissions tendered on 06 November 2014 accompanied by an affidavit of a legal officer.
- [5] However, Goundar JA in the Ruling of 05 December 2014 had allowed extension of time to appeal despite the notice of appeal having been out of time by 2 1/2 months and determined that the Appellant is entitled to appeal on ground 01 as of right as it involves a question of law alone and granted leave to appeal in respect of ground 03 and refused leave to appeal on ground 02. The Appellant has not sought to have the application for leave to appeal determined before the Court duly constituted to hear and determine the appeal under section 35(3) of the Court of Appeal Act relating to ground 02 where leave was refused.
- [6] The counsel for the Appellant informed this Court at the hearing on 18 August 2017 that he would pursue only the first and third grounds of appeal against the conviction and rely on the written submissions filed on 05 September 2014 at the leave to appeal stage while the Respondent had tendered fresh written submissions on 28 July 2017 in respect of the hearing of the appeal on the conviction.

Grounds of Appeal

- [7] Therefore, the grounds of appeal that would be considered by this Court are as follows.

Ground 1

- (i) *'The Learned Trial Judge erred in law and in fact when he did not properly and direct the assessors on the essential elements of the charge of rape contrary to section 207(1)(2)(a) of the Crimes Decree No.44 of 2009 resulting in a substantial miscarriage of justice.'*

Ground 3

- (ii) *'The Appellant was prejudiced due to lack of legal representation resulting in a substantial miscarriage of justice.'*

Summary of evidence

The extract of prosecution evidence.

- [8] The complainant, a 19 year old girl, had started walking from Wailoku at around 12,30 p.m. and reached Jittu at around 2.30 p.m. in order to meet her boyfriend who is currently her husband. She had been used to undertake that journey every week. When she was on a path leading to her boyfriend's house, at a place nearby, the Appellant, 42 years old at the time, had called her and she had felt obliged to answer his call as he was a friend of her boyfriend and she had met him before. The Appellant had told her that her boyfriend was not at home and he would go and look for him while the victim had sat on the doorstep. After a while the Appellant had come back and informed the victim that he could not find her boyfriend. Thereafter, the Appellant had dragged her inside the house and closed the door saying that he was an ex-prisoner. He had made her lie down, taken her clothes off and kissed her breasts and sucked her nipples. Then, though the victim had resisted three times, the Appellant had removed her pant in the last attempt. Thereafter, he had removed his clothes and the victim had seen his erect penis. The Appellant had then inserted his

penis into her vagina while threatening her not to shout or he would do something to her. She had not resisted as she was weak and frightened due to the Appellant's threats.

- [9] The Appellant had thus had sexual intercourse with the victim for about 20-25 minutes on the floor of the sitting room of his house. After that she had got up, got dressed and gone to her boyfriend's house crying and told him as to what happened. The boyfriend had suggested that it should be reported to police. Later in the same evening both had gone to the police station and made a complaint.
- [10] Her boyfriend, Ulaiasi Ratu, had been watching a movie when the complainant, now his wife, had come crying between 4.00 and 5.00 p.m. She had looked weak, frightened and scared. When questioned, she had told him that the Appellant, who was his friend and whom he knew by his name and nickname, had raped her. The boyfriend had gone to the Appellant's house to question him but the house had been closed and locked. Both had then proceeded to the police station.
- [11] Upon the receipt of the complaint, the police had commenced investigations around 7.00 p.m. and when the police officers went to the Appellant's house at Jittu Estate it had been closed but they had observed a pathway going around or adjoining his house.
- [12] Dr. Boniface Dumutalau who had examined the victim around 6.00 p.m. on 16 March 2012 had recorded a history of rape of the complainant around 3.00 p.m. and a threat to her not to shout in the Medical Examination Form produced at the trial as an exhibit. Further, the complainant had been sexually active and last indulged in sexual intercourse with her boyfriend on 12 March 2012. No lacerations on the introitus (i.e. the opening leading to the vaginal canal) or tooth marks on the breasts had been observed. According to the doctor no injuries had been noted and his findings had been inconclusive but his evidence is that rape cannot be ruled out and in sexual assaults there may or may not be lacerations.

- [13] The prosecution also produced the Appellant's caution interview where the Appellant had admitted having had sexual intercourse but with her consent. At the close of the prosecution case the trial judge had recorded that there was a case to answer (meaning that there was evidence that the Appellant had committed the offence - vide section 231 (2) of the Criminal Procedure Act 2009).

The extract of accused's evidence from the trial and the caution interview.

- [14] The accused in his sworn evidence had testified that he had had many girlfriends and used to change them every month. On the day of the incident he had been sleeping in his house and had woken up when he felt that someone had entered the house. Then he had seen a girl standing and he had invited her in. She had come and sat beside him and claimed that she was a neighbour but not said that she was the girlfriend of his friend. He had then '*fixed*' her and asked her whether they could have sex. She had expressed concern as to whether anybody would hear or see them. At one point hearing his landlord calling him from outside, the girl had jumped onto his bed. She had asked him to close the door and put down the curtains. Thereafter had had touched and sucked her breasts and then caressed all over her body and she had said that she was enjoying. She had also said that she liked him using his mouth and he had removed her pant and obliged her. Thereafter, both had engaged in more intimate sexual acts at her request and had sex for half an hour. After the act of sexual intercourse was over she had asked whether she could stay in his house and he had agreed. He had then given her FJD 02 and she had left and he had left for work. On the following day the police had arrested him on the allegation of rape. He is emphatic in his caution interview and in his evidence at the trial that he had engaged in sexual intercourse with the complainant with her consent.
- [15] Thus, the gist of the Appellant's evidence is that the 19 year complainant had virtually forced herself on the 42 year Appellant to engage in sexual intercourse. Not forgetting that the victim had walked for 02 hours to see her boyfriend and when she had almost reached there, she had walked into his house and seduced the unknown Appellant literally begging him for sexual pleasure, in my view, carries little credibility.

[16] I shall now deal with the grounds of appeal.

Ground 1 – “The Learned Trial Judge erred in law and in fact when he did not properly and direct the assessors on the essential elements of the charge of rape contrary to section 207(1)(2)(a) of the Crimes Decree No.44 of 2009 resulting in a substantial miscarriage of justice.”

[17] The relevant paragraphs in the summing up are as follows:

'In our law, rape is committed when someone invades the body of another without that other's consent and for the purpose of this case rape is normal penile sexual intercourse without consent. Consent must have been freely given and not given in fear of authority or by threat.'

'In this case, it is not in dispute that there was an act of sexual intercourse in the afternoon of 16th March 2012. What is in dispute is the issue of consent. If you believe P (real name withheld) that the Accused pulled her into his house and raped her, then you will find him guilty of rape. The accused however says that the sex was by mutual agreement and that P enjoyed it and agreed to it all along. It is a matter for you.'

[18] The Appellant's complaint here is that the Learned High Court Judge had failed to direct the assessors that in addition to the act of sexual intercourse and lack of consent the prosecution also should prove that the Appellant had no knowledge of the absence of consent on the part of the complainant in order to bring home the charge of rape against him. In other words, the Appellant contends that the Appellant's knowledge of lack of consent of the complainant is an element of the offence of rape and the learned trial judge should have addressed or directed the assessors of that element as well and the failure to do so has resulted in a substantial miscarriage of justice. This, no doubt is an important question of law. I would endeavor to answer this vital matter of law which concerns the possible fault element of the offence of rape.

[19] Section 207(1) states that '*Any person who rapes another person commits an indictable offence.*' It further stipulates that the punishment for rape is imprisonment for life. Section 207(2) states that:

'A person rapes another person if –

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b)

(c)

[20] I find that in order to resolve this important issue of law the primary source of guidance would be the provisions of the Crimes Decree, 2009 (now Crimes Act, 2009). Therefore, I shall now proceed to analyze those provisions of law found in the Crimes Act, 2009.

Elements of an offence

[21] Section 13 (1) states that an offence consists of physical elements and fault elements. Fault element in some jurisdictions is called the mental element or *mens rea*. It can easily be understood that any given offence could have more than one physical element and more than one fault element. According to section 13(2), the law that creates a particular offence could provide that there is no fault element for one or more physical elements of that offence. Similarly the law that creates an offence could also provide different fault elements for different physical elements [*vide* section 13(3)] of that offence. Therefore, unless the law creating an offence specifically provides otherwise as anticipated in sections 13(2), every such offence must be taken to consist of physical as well as fault elements. Thus, the mere absence of a specific reference to a fault element in an offence does not mean or presupposes the lack of a fault element/s in that offence unless the law creating that offence specifically rules out such a fault element.

Strict liability

- [22] There is another class of offences recognized by the Crimes Act. The law creating a particular offence could provide that an offence to be a strict liability offence in which event there are no fault elements for any of the physical elements of such a strict liability offence [*vide* section 24(1)(a)]. The law creating an offence may also provide that strict liability applies to a particular physical element of that offence [*vide* section 24(1) and (2)] in which event there are no fault elements for that physical element [*vide* section 24(2)(a)]. Thus, there can be two types of strict liability offences.

Absolute liability

- [23] Section 25 deals with offences of absolute liability which are similar to the two types of strict liability offences under section 24 except that the defense of mistake of fact under section 35 is unavailable to the two types of absolute liability offences whereas mistake of fact as a defense is available in respect of strict liability offences.
- [24] It appears that the offences referred to in section 13(2) could either become strict liability offences or absolute liability offences depending on how the law creating the offence may provide.

Offences that do not specify fault elements

- [25] There are other offences where the law creating those offences do not rule out fault elements but do not specify fault elements and thus, are silent as to the required fault elements. In other words, those offences have no fault elements inbuilt in the definition of the offences. However, it would be wrong to assume that those offences have no fault elements. It is to deal with such offences that Crimes Act, 2009 has promulgated section 23.

- [26] Section 23 (1) and (2) declare
'If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.'
[section 23(1)]
'If the law creating the offence does not specify a fault element for a physical element that consists of circumstance or a result, recklessness is the fault element for that physical element.'
[section 23(2)]
- [27] The physical elements of an offence are (a) conduct or (b) a result of conduct or (c) a circumstance in which conduct, or a result of conduct, occurs [*vide* section 15(1)].
'Conduct' means an act, or an omission to perform an act or a state of affairs and
'engage in conduct' means (a) do an act or (b) omit to perform an act [*vide* section 15(2)].
- [28] I am of the view the offence of rape is in the category of offences that do not specify fault elements as envisaged by section 23. If so, then the question is whether the physical element in the offence of rape consists only of conduct or a result of conduct or circumstance. In other words it has to be determined whether the offence of rape comes under sections 23(1) or 23(2). To find an answer, I would go back to the definition of rape in section 207(2) (a). It is my considered view that the words '*carnal knowledge with or of the person without the other person's consent*' being or constituting the physical act of rape denote not just conduct but a circumstance as set out in section 15(1)(c). It should be understood that absence of consent is an essential part of the *actus reus* (see **Smith & Hogan Criminal Law Sixth Edition** page 433) and not part of the *mens rea*.
- [29] Carnal knowledge is complete on penetration to any extent [*vide* section 206(4)]. But, the physical element of rape under section 207(2) (b) consists not only of penetration but penetration without the other person's consent which is more than mere conduct and therefore constitutes a circumstance in which the act of penetration occurs, rather than only the conduct i.e. act of penetration.

- [30] The word circumstance is not defined in the Crimes Act, 2009. It has been defined in the Cambridge English Dictionary as '*a fact or event that makes a situation the way it is*' and as '*a fact or condition connected with or relevant to an event or action*' by the Oxford English Dictionary. Merriam-Webster Dictionary describes it as '*a condition, fact, or event accompanying, conditioning, or determining another; an essential or inevitable concomitant*'. Webster's New World Dictionary describes a circumstance as '*a fact or event accompanying another, either incidentally or as an essential condition or determining factor*.' Therefore, I am inclined to conclude that penetration without the other person's consent is a circumstance rather than a mere conduct.
- [31] Therefore, since section 207 (2) (a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the victim's consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well, though not applicable in this case.
- [32] Section 14 states *inter alia* that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [*vide* section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1).
- [33] Section 21(1) states
'A person is reckless with respect to a circumstance if -
 (a) *he or she is aware of a substantial risk that the circumstance exists or will exist;*
and
 (b) *having regard to the circumstances known to him or her, it is unjustifiable to take the risk. '*

- [34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [*vide* section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.
- [35] Although the above discussion is sufficient to decide the fault element in the offence of rape, for the sake of completion and better understanding, it would be pertinent to see how the legal requirements in the offence of rape have developed in the U.K.
- [36] Section 1 (1) of the Sexual Offences Act 1956 (U.K.) provided '*It is an offence for a man to rape a woman*' but said nothing more. As a result the definition of rape was a matter of common law. Then, Sexual Offences (Amendment) Act 1976 codified the law as laid down by the House of Lords in **Director of Public Prosecutions v Morgan** [1975] 2 All ER 347 as follows.
- Section 1. (1) For the purpose of section 1 of Sexual Offences Act 1956 a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;*
- [37] To complete the *actus reus* of rape slightest penetration was sufficient and it was not necessary to prove that the hymen was ruptured: Nor was emission of seed required. As for *mens rea*, the accused must have intended to have sexual intercourse with the woman (i) knowing that she did not consent, or (ii) being aware that there is a possibility that she did not consent or that the accused was aware that the woman may not be consenting but proceeded to have intercourse with her, notwithstanding that awareness, that is to say either knowing that she was not consenting or not caring whether she was consenting or not (see **Smith & Hogan Criminal Law Sixth Edition** page 429-438 and **Blackstone's Criminal Practice 1993** pages 172-178).

[38] Section 1 of the Sexual Offences Act 1956 was substituted by section 142 of the Criminal Justice and Public Order Act 1994, providing a new and broader definition of rape. But the *mens rea* remained the same. It read as follows.

(1) *It is an offence for a man to rape a woman or another man.*

(2) *A man commits rape if*

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

(b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

[39] Rape has been redefined from the Sexual Offences Act 1956 (amended in 1976 and 1994) to read in Sexual Offences Act 2003 as follows:

1 Rape

(1) A person (A) commits an offence if (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

[40] Thus, the *actus reus* of rape now in U.K is the penetration of the vagina, anus or mouth of another coupled with the other person's lack of consent. The *mens rea* is intention to penetration (perhaps as opposed to a reckless or accidental act) and lack of reasonable belief entertained by the accused of the victim's consent.

[41] Therefore, it appears that in the evolution of the offence of rape in U.K. knowledge, recklessness, intention and reasonable belief have been held to constitute the *mens rea* of the offence.

[42] Coming back to the Appellant's contention that the prosecution should also prove an accused's knowledge of lack of consent of the victim as the third element of the offence of rape under section 207 of the Crimes Act, 2009, I have already held that it is recklessness that is the fault element of the offence of rape. However, as stated

above the prosecution could prove the fault element of recklessness by proving intention, knowledge or recklessness.

- [43] To put in simple terms, a person could be said to have a direct intention where it is his primary purpose (not the motive), aim or objective to achieve a particular result. For example, when it is one's purpose to eat a chocolate and if he eats the chocolate, he intends to eat the chocolate. A person could be said to have an 'oblique' intention where, although a particular result is not his primary purpose or objective, he appreciates, as a virtual certainty, that that result will occur as a consequence of his conduct. Therefore, for example, a person who blows up a building in order to destroy incriminating documents, knowing that the building is occupied and that there is a virtual certainty of death or serious harm, will have an direct intent to cause criminal damage and an oblique intent to cause death or grievous bodily harm.
- [44] A person is negligent if he is unaware of the risk in question but ought to have been aware of it or having foreseen it he does take steps to avoid it but those steps fall below the standard of conduct which would be expected of a reasonable person. In other words negligence is the inadvertent taking of an unjustifiable risk.
- [45] Recklessness is conscious taking of an unjustifiable risk. If an accused is aware of the risk and decides to take it, he is reckless but if he is unaware of the risk but ought to have been aware of it he is negligent.
- [46] Having analyzed the totality of evidence, I am satisfied beyond reasonable doubt that the Appellant is guilty of recklessness in that he could not have intended anything other than to have sexual intercourse with the victim. Even otherwise, he ought to have been aware of the risk he was taking with the victim who according to him was a stranger. He was guilty of negligence. In any event, the Appellant had consciously taken an unjustifiable risk in having sexual intercourse with the victim and at the least been reckless. The Appellant's conduct suggests nothing short of one or more of the above states of mind at the time he committed penetration without the victim's consent.

- [47] However, it is clear from the summing up that the Learned Trial Judge had not addressed or directed the assessors on the fault element of the offence of rape. Since the Appellant had appeared in person he may not have understood the omission to ask for a redirection. Yet, I am surprised that the Prosecutor too had been silent despite the trial judge having specifically asked the Prosecutor whether he had to add anything to the summing up.
- [48] **Abdul Khair Mohammd Islam** [1997] 1 Cr. App. R. 22 Buxton LJ said
'At the end of the summing-up neither counsel reminded the judge of that omission.'
- [49] His Lordship the Chief Justice in **Raj v The State** CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] said
'The raising of direction matters in this way is a useful function and in following it, counsel assist in achieving a fair trial.'
- [50] Time and again this Court too has emphasized the need of the counsel to raise any matters of omission or misdirection by way of redirections with the trial judge at the end of the summing up. This will not only help in achieving a fair trial but also alleviate the need of appeals being taken regularly to this Court based purely on such omissions or misdirection which could have been easily dealt with in the lower court saving valuable judicial time of the Court of Appeal for deserving appeals. In this case I would not expect the Appellant to have done so but the Prosecuting counsel should have alerted the trial judge but has failed in his duty.
- [51] Analysing the evidence of the prosecution carefully, I find that the victim's testimony has stood the test of probability, consistency, lack of contradictions, promptness and been enhanced by the corroboration in the form of her subsequent demeanour, recent complaint and the observations of her boyfriend. Her testimony had remained unshaken and emerged unscathed. To me, the victim comes across as a very credible witness. I would not expect to see injuries in her consistent with and corroborative of an act of forcible sexual intercourse as she had admittedly not resisted out of fear coming from a self-proclaimed ex-prisoner. Law does not require the woman to have

resisted physically [see **Olugboja** [1982] QB 320 & (1981) 73 Cr App Rep 344]. Submission without physical resistance by the victim to an act of the accused shall not alone constitute consent (*vide* section 206 (1) of the Crimes Act, 2009).

[52] Penetration need not be against the will but only without the consent of the victim. Consent here is consent freely and voluntarily given [*vide* section 206 (1) of the Crimes Act, 2009], though the victim need not necessarily communicate the positive consent. It may be sufficient if such free and voluntary consent could be presumed or gathered from the victim's conduct and circumstances. I am convinced that there had never been such a free and voluntary consent on the part of the victim in this case.

[53] It may also be mentioned, as a passing remark, that there is no apparent motive for the victim to have falsely implicated the Appellant for having committed rape if it had happened with her consent as alleged by the Appellant. I have no doubt that on the evidence the case against the Appellant has been proved beyond reasonable doubt. On the contrary, I find the Appellant's version, though consistent, sounds fanciful and far removed from reality of human behaviour. I do not believe the Appellant. I agree with the assessors' opinion and the judgment of the trial judge.

[54] I am also conscious of what R.M. Lodha, J. speaking on behalf of the Supreme Court of India said in **Rajinder Raju v. State of H. P.** Criminal Appeal No. 670 of 2003 decided on 07.07.2009,

'a woman victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman....; she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her.'

[55] Therefore, the first ground of appeal is decided in favour of the Appellant. However, I have no hesitation in dismissing the appeal on that ground in terms of the proviso to section 23(1) of the Court of Appeal Act as no substantial miscarriage of justice has

occurred as result of the omission in the summing up given the evidence led against the Appellant.

Ground 3 - 'The Appellant was prejudiced due to lack of legal representation resulting in a substantial miscarriage of justice.'

- [56] There seems to be two aspects to the Appellant's complaint. One is that the trial judge had not placed before the assessors the evidence arising from the cross-examination of the victim and the Appellant's own evidence. The other is that he could not ask for a redirection on law namely the omission to refer to the third element i.e. fault element of the offence of rape as he was unrepresented.
- [57] I have examined the summing up and it is clear that the trial judge has in paragraph 13 and 16 fully placed the Appellant's consistent position before the assessors that he had engaged in sexual intercourse with the victim with her consent. In fact the assessors had read the caution interview of the Appellant produced as part of the prosecution case where the Appellant had described in even greater detail than his evidence at the trial as to how he happened to have sexual intercourse with the victim after she had literally submitted herself for sexual pleasure at the hands of the Appellant.
- [58] Moreover, as the judge had stated in the summing up this had been a very short trial of two days where the evidence of both the prosecution and the defence had been concluded on 02 April 2013 and the trial judge had summed up to the assessors on the following day. The assessors would have been fully aware and able to recollect the evidence of both sides very well before they expressed their opinion on the second day. I am convinced that there has been sufficient direction to the assessors to consider the Appellant's position of consensual sex with the victim in the caution interview and in his evidence. I do not think that the trial judge has fallen short in his duty in this respect.
- [59] The Appellant had been present for the first time in the High Court on 23 March 2012. He had informed court on 20 April 2012 that he would retain a private lawyer and the court had advised him to do it as soon as possible and warned that delay in getting a

lawyer could not be an excuse to delay the trial. As the Appellant had not retained a lawyer the court had asked him to apply for legal aid on 18 May 2012. On 16 July 2012 the court proceedings read as follows.

‘Court - Apply to Legal Aid Commission?

Accused – I have applied but no response. I want to appear in person. Legal Aid Commission very late with result. Been 2 months now and I want to make plea today.’

[60] After a few more call days the trial judge had explained to the Appellant the legal process of the trial on 28.03.2013. The trial had finally commenced on 02 April 2013. Thus, it is clear that the trial had commenced more than a year after the Appellant’s first appearance and he had not retained a lawyer of his choice. Neither had he obtained legal aid. In the meantime he had specifically indicated that he would appear in person.

[61] I have perused carefully the Appellant’s cross-examination of the victim and I would say that it had been very thorough and complete in the sense that he had unequivocally put to the witness his position that he had engaged in sexual intercourse with her consent though she had vehemently denied it. The trial judge had put his case to the victim at the end of the cross-examination and the victim had completely denied it. He had given evidence also on the same lines consistent with his cross-examination of the victim and his caution interview. I cannot see what more could have been done on behalf of the Appellant even if he had been represented by a lawyer. No miscarriage of justice had ensued by lack of legal representation on behalf of the Appellant.

[62] Thus, the third ground of appeal is rejected.

[63] In my view, neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as ill-founded. I think, having regard to the evidence led the Appellant could have been convicted of the charge levelled against him and therefore the verdict of guilt against him could be supported. I would follow **Ram v. State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] where the

Supreme Court held *inter alia* that '*an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case*'. To my mind the verdict of guilt against the Appellant is neither unsafe nor dangerous. I have no doubt that on the available evidence the case against the Appellant has been proved beyond reasonable doubt and the only reasonable and proper verdict would be one of guilt. No substantial miscarriage of justice has occurred.

- [64] Therefore, I conclude that the appeal should stand dismissed and the conviction be affirmed.


Temo, JA

- [65] I have read His Lordship Mr Justice Prematilaka's draft judgment and agree with the reasons and conclusions reached by His Lordship.


The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*




.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL


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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL


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Hon. Mr. Justice S Temo
JUSTICE OF APPEAL